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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE HONORABLE DON SUNDQUIST,
Petitioner

v.

WAYNE CHASTAIN,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICI CURIAE OF NATIONAL ASSOCIATION OF BROADCASTERS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, BONNEVILLE INTERNATIONAL CORPORATION, MAGAZINE PUBLISHERS OF AMERICA, INC., NATIONAL NEWSPAPER ASSOCIATION, PULITZER BROADCASTING COMPANY, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI, TIME INC., AND THE WASHINGTON POST

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PRELIMINARY STATEMENT

The National Association of Broadcasters, the American Society of Newspaper Editors, Bonneville International Corporation, the Magazine Publishers of America, Inc., the National Newspaper Association, Pulitzer Broad-

casting Company, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, the Society of Professional Jourialists, Sigma Delta Chi, Time Inc., and The Washington Post respectfully request leave to file the attached Brief Amici Curiae.[1] The amici who have joined in this request and in the attached brief include broadcasters, publishers, editors, news directors, journalists, and associations repsenting them. Together they comprise a broad crosssection of the news media in this country. They submit this brief in support of the Petition for Certiorari filed by The Honorable Don Sundquist, member of the House of Representatives of the United States of America.

INTEREST OF THE AMICI

The National Association of Broadcasters, organized in 1922, is a nonprofit incorporated trade association comprised of more than 5,000 radio stations, 970 television stations, and the major commercial broadcast networks. NAB's members cover, produce, and broadcast the news to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate information concerning the activities of government and other matters of public concern.

The American Society of Newspaper Editors is a nationwide professional organization of more than 1,000 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of this society include the ongoing responsibility to improve the manner in which the journalism profession carries out its obligations in providing an unfettered and effective press in the service of the American people.

Bonneville International Corporation operates two television stations and twelve radio stations located in seven

[1] Written consents to filing of this brief are being filed pursuant to Rule 36.

states. The Bonneville stations feature news reporting at the local, regional, and national levels, and Bonneville maintains a Washington, D.C., news bureau in order to augment its stations' ability to broadcast news items and public affairs information to the public. Bonneville is interested in the instant case, which affects First Amendment rights in this area.

The Magazine Publishers of America, Inc., is a national trade association including in its membership more than 200 magazine publishers who publish approximately 900 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications and publish weekly, biweekly, and monthly publications covering literature, religion, law, political affairs, science, agriculture, industry, and many other interests, avocations, and pastimes of the American people.

The National Newspaper Association is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in 1885, NNA, with more than 5,000 member newspapers, is the oldest and largest national trade association in the newspaper industry. For over a century, a prime concern of NNA has been that political debate in this country be conducted in an open and robust manner. A free flow of information to the public from the government via the press is fundamental to maintaining the health and vigor of such debate. NNA has consistently opposed efforts to reduce that flow, particularly where allegations of government misconduct are involved.

Pulitzer Broadcasting Company, a wholly-owned subsidiary of Pulitzer Publishing Company, is the licensee of seven television broadcast stations, one standard broadcast station, and one FM broadcast station.

The Radio-Television News Directors Association is a professional association of electronic journalists. The As-

sociation has more than 2,500 members who gather, edit, and disseminate news and other public affairs information carried by the national broadcast and cable networks, local radio and television broadcast stations, and cable television systems.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every recent Supreme Court case involving the First Amendment rights of reporters to gather and disseminate news and information. It has provided representation, information, legal guidance, or research in virtually every major press freedoms case litigated since 1970.

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, not-for-profit organization of nearly 20,000 members. The Society is the largest and oldest organization of journalists in the United States, representing every branch and rank of print and broadcast journalism.

Time Inc. is the largest publisher of general circulation magazines in the United States. It publishes and distributes *Time* magazine, *Fortune*, *Sports Illustrated*, *People*, *Money*, *Life*, and, through its subsidiary, Southern Progress Corporation, also publishes *Southern Living* and *Southern Accent* magazines. *Time* magazine alone has a domestic circulation of 4.6 million.

The Washington Post, a division of The Washington Post Co., publishes a daily newspaper of general circulation in the Washington, D.C., area (circulation approximately 800,000 weekdays, 1,050,000 Sundays) and maintains a substantial newsgathering organization.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae are concerned that the First Amendment issues implicit in the decision by the Court of Appeals were not sufficiently addressed in that opinion or considered by the court. Amici can offer the Court a perspective on these issues that may not have been highlighted by the litigants.

First, it is clear that the Court of Appeals focused only on the "official immunity" that Representative Sundquist had raised as a defense to plaintiff's defamation claims. The Court of Appeals rejected Sundquist's argument that members of Congress, like members of the executive and judicial branches of government, should enjoy an immunity from liability for all acts performed in the course of their official duties. But in analogizing the "official immunity" Sundquist sought to the "executive immunity" that applies to the executive branch of government, the Court of Appeals rejected too much.

While denying a claim for a blanket tort immunity for members of Congress, the court did not need to reject what was essentially a claim of privilege for speech made by members in the course of their official duties. The special status of speech under the First Amendment and the important role that open discussion and debate play in our system of government suggest that speech by a member of Congress should be carefully distinguished from other acts that might give rise to other forms of tort liability. The decision of the Court of Appeals failed to make this distinction. Amici consider this distinction to be central to any constitutionally sound decision regarding the rights of members of Congress to speak freely about issues of public concern in the course of their official duties.

Amici therefore contend that any decision that limits or inhibits the ability of members of Congress to speak freely on issues of public concern is constitutionally unsound because it impairs significant First Amendment

values. In support of this contention, amici offer the following three-part argument:

A. If members of Congress are forced to assess their risk of liability before they speak openly on issues of public concern, the quality of public debate, in which the press is an important participant, will be impoverished.

B. A qualified privilege would lighten the burden of fear and uncertainty and encourage members of Congress to speak more freely to their constituents and to the press.

C. By recognizing a privilege for members of Congress who speak out on issues of public concern, this Court would strengthen protection for the press to report and comment on those statements.

For these reasons, amici urge this Court to grant Representative Sundquist's petition for *certiorari* and reverse the decision of the Court of Appeals that refused to recognize a privilege for statements made by members of Congress in the course of their official duties but outside their strictly legislative functions. Members of Congress should be free to communicate openly on issues of public concern at anytime and in any place.

ARGUMENT

I. If Members of Congress Are Forced to Assess Their Risk of Liability Before They Speak Openly on Issues of Public Concern, the Quality of Public Debate, in Which the Press Is an Important Participant, Will Be Impoverished.

By declining to recognize a privilege for members of Congress to speak openly to their constituents and to the press, the Court of Appeals for the District of Columbia Circuit has jeopardized the marketplace of ideas protected by the First Amendment. When members of Congress are inhibited from communicating openly about issues of public concern, the press will lose one of the most important and newsworthy sources of commentary on is-

sues of the day.[2] The decision of the Court of Appeals will discourage members of Congress from communicating their views to the press as well as to their constituents. This "chilling effect" may affect not only the quality of public debate but also the quality of government itself. As Judge Mikva observed in dissent:

> When a government official lives in fear of litigation stemming from his official acts, he will often fail to execute his office and perform his responsibilities with the vigor and decisiveness required by the public good.

Chastain v. Sundquist, 833 F.2d 311, 329 (D.C. Cir. 1987) (Mikva, J., dissenting).

The press often relies on members of Congress and their staffs for insight and commentary on the operation of government. Fear of litigation is likely to reduce the availability of this information and deny the necessary "breathing space" for the free and open discussion of issues of public concern. *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964). In such a climate, the prudent member of Congress will become more guarded in what he or she says to his or her constituents, to his or her political adversaries, and to the press. The muffling—even slightly—of this vital source of information deprives the electorate and the press of information about the way government functions and the ways its elected and appointed officials operate. Without this information, the

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[2] Whenever a member of Congress speaks in the course of his official duties, it is a matter of "public concern." The exchange of communications with his constituents is, for example, not only a useful forum for the exchange of ideas but also a necessary part of representative government. The decision of the Court of Appeals leaves this entire dialogue vulnerable to defamation suits. Furthermore, members of Congress may communicate to others, including the press, concerning matters raised in constituent communications. These communications are equally unprotected under the Court of Appeals decision, though they are clearly a matter of "public concern."

electorate is ill-equipped to develop informed opinions and make informed decisions about its government.

The First Amendment is a powerful guardian not just for the expression of ideas but also for the dissemination of information. *Id.* ("protection of the public requires not merely discussion, but information"). Without information, political debate on public issues cannot be "uninhibited, robust, and wide-open." *Id.* at 270. In a representative government, the people participate in this robust debate, in substantial part, by electing representatives and by engaging in an ongoing dialogue, enriched by the mutual exchange of information, with those elected representatives. As part of this continuing dialogue between the electorate and its elected officials, those officials have a duty to communicate with their constituents. As Woodrow Wilson observed,

> It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents.

W. Wilson, *Congressional Government* 303 (1885).

Congress has itself recognized that representative government is meaningless without full and effective communication with the electorate. For this reason, Congress provides substantial financial support for direct communications between members of Congress and their constituents. This support includes free postage for letters, telephone and telegraph allowances, stationery allotments, and favorable prices on reprints from the *Congressional Record*. *See Gravel v. United States*, 408 U.S. 606, 650 (1972) (Brennan, J., dissenting). Recognizing the importance of communication with the electorate, both houses of Congress have voted to allow broadcast coverage of debates and committee meetings.

The opportunities for such direct communication, however, are constrained by the practicalities of modern government. Constituents rarely have the opportunity to observe their elected representatives firsthand and may not be able to observe televised debates or hearings. Nor may they have time to digest the mountains of information that emanate from Washington in the form of verbatim reports in the *Congressional Record*. Consequently, Congress often communicates to the public, and the public to Congress, through the press. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (noting the media's function as a "surrogate" for the public). This Court has recognized the importance of the role of the press in promoting this communication:

> Without the information provided by the press, most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

If one major source of information for this vital channel of communication is inhibited from openly expressing its views, the representative character of our political system is compromised. The Court is presented with an opportunity to ensure that these vital lines of communication between Congress and the electorate remain open and that the press is able to continue its role as a participant in this dialogue. In so doing, the Court will help to ensure that each citizen is able to participate in and contribute to our representative system of self-government. *See Thornhill v. Alabama*, 310 U.S. 88, 95 (1940) ("Abridgement of freedom of . . . the press . . . impairs those opportunities for public education that are essential to . . . the processes of popular government").

Communication between elected officials and the press has a "structural" role to play in securing and fostering American representative democracy. *See Richmond News-*

papers, 448 U.S. at 587-88 (Brennan, J., concurring in judgment). For example, when members of Congress share their views on government with the press, they promote accountability in government by exposing government action to public scrutiny.[3] This communication not only promotes public scrutiny of official conduct but also permits the public to make an informed contribution to the ongoing debate concerning allocation of responsibility among the three branches of government. As the Ninth Circuit has observed.

> The public press performs its most valuable function in the interest of the people at large by correctly reporting proceedings which relate to the administration of law. It is vital in a country which relies upon representative officials that the public be so informed. Otherwise, there is no guard against maladministration.

Borg v. Boas, 231 F.2d 788, 794 (9th Cir. 1956). Without the press's participation in creating an informed public, governmental officials may escape the critical and constructive scrutiny that is vital to ensure a properly functioning representative government.

By refusing to recognize a privilege for members of Congress to perform this "supervisory" activity,[4] the

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[3] Justice Holmes discussed this scrutinizing function of the press with respect to judicial proceedings:

> [The privilege is justified by] the security which publicity gives for the proper administration of justice . . . It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Cowley v. Pulsifer, 137 Mass. 392 (1884).

[4] *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring in judgment); *see also* Note, *Privi-*

Court of Appeals has sent a signal to members of Congress that commentary and criticism of government, government agencies, and government officials made outside the floor of Congress is not one of their "official duties." In so doing, the Court of Appeals has failed to acknowledge this Court's observation that a legislator's duty to inform the public about matters affecting the administration of government is one of the things "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *see also Watkins v. United States*, 354 U.S. 178, 198 (1957); *Gravel*, 408 U.S. at 625.

These conflicting signals can contribute only confusion and uncertainty and will encourage members of Congress to follow the safe route of silence rather than risk exposing themselves to defamation suits. By granting *certiorari*, the Court could eliminate this uncertainty and encourage members of Congress now at risk to speak out on important issues, even when they are not on the floor of Congress. That these 'informing" and "supervising" functions of Congress are not strictly legislative in nature should not prevent members of Congress from performing them without fear of liability. As Judge Mikva observed,

> These tasks are entitled to—but more important, these tasks *need*—no less protection than the tasks performed by the vast majority of other governmental officials in the exercise of their authority.

Chastain, 833 F.2d at 332 (Mikva, J., dissenting).

Without protection for these important tasks, members of Congress will be discouraged from communicating.

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lege to Republish Defamation, 64 Colum. L. Rev. 1102 (1964) (analysis of "supervisory," "informational," and "agency" rationales); Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. Rev. 469 (1979) (discussion of "supervision," "information," and "agency" theories).

This Court should take this opportunity to encourage, not to discourage, those best suited and best placed to make a meaningful contribution to the discussion of issues of public concern.

II. A Qualified Privilege Would Lighten the Burden of Fear and Uncertainty and Encourage Members of Congress to Speak More Freely to Their Constituents and to the Press.

The Court of Appeals failed to recognize any kind of privilege for remarks that members of Congress make while carrying out their official duties. This case presents the Court with an opportunity to establish a standard of proof that will allow members of Congress who speak out on public issues a measure of comfort as to their exposure to liability for defamation.

The Court of Appeals decision, if allowed to stand, leaves members of Congress exposed to liability on a mere showing of negligence for comments made while carrying out their official duties. In *Sullivan* and *Gertz* this Court struck a balance between the First Amendment interest in encouraging "uninhibited, robust and wide-open" debate on public issues, *Sullivan*, 376 U.S. at 270, and the government's interest in securing compensation for "individuals for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Hutchinson v. Proxmire*, 443 U.S. 111, 133-84 (1979).

A qualified privilege tempered by an "actual malice" standard would at least reduce the uncertainty that inhibits members of Congress from speaking openly about public issues, whether those issues concern "private" or "public" figures. Moreover, members of Congress cannot be expected to anticipate whether the potential defamation plaintiffs who may take offense at their words are private or public figures. The fact that the member's comments may concern private or public figures has no bearing on the newsworthiness of those comments or their contribution to the public debate. "Here the speech

concerns the legitimacy of the political process, and therefore clearly 'matters.'" *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986) (quoting *Gertz*, 418 U.S. at 341 (First Amendment "protect[s] speech that matters")).

This Court has recognized that "newspaper reports of public meetings of the citizens of a community concerned about matters of local governmental interest and importance" deserve First Amendment protection. *Greenbelt Cooperative Publishing Association v. Bresler*, 380 U.S. 6, 13 (1970). Just as news reports of these meetings are vital to free political discussion, without regard to the status of the participants as private or public figures, so too is the willingness of governmental officials to participate in this kind of dialogue. Only by recognizing a privilege can this Court ensure that "*all* issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" will be discussed by Congress and reported by the press. *See Thornhill*, 310 U.S. at 102 (emphasis added).

III. By Recognizing a Privilege for Members of Congress Who Speak Out on Issues of Public Concern, This Court Would Strengthen Protection for the Press to Report and Comment on Those Statements.

The common law "record privilege" permits the press to republish remarks made by an official in an "official governmental proceeding." *Restatement (Second) of Torts* § 611, comment d (1977). Several state courts have extended this privilege to cover remarks that an official makes in the scope of his or her official duties, though not in an "official governmental proceeding." *See, e.g., Kilgore v. Younger*, 102 Cal. App. 3d 744, 162 Cal. Rptr. 469 (1980); *Short v. News Journal Co.*, 58 Del. 592, 212 A.2d 718, 721-22 (Del. 1965); *see also, Foster v. Turner Broadcasting System, Inc.*, 1988 Westlaw 32881 (2d Cir. Apr. 13, 1988). By recognizing a privilege for members of Congress for the remarks they make in the course of their

official duties, this Court would recognize, strengthen, and clarify the privilege of the press to republish these remarks and thereby enrich public debate on issues of public concern.

The Speech and Debate Clause grants members of Congress immunity for statements they make in official legislative proceedings. U.S. Const. art. I, § 6, cl. 1; *Hutchinson*, 443 U.S. at 113. The "record privilege" gives the press a corresponding privilege to report those statements, provided it does so in a fair and true report. *See, e.g., Holy Spirit Ass'n v. New York Times Co.*, 49 N.Y.2d 63, 424 N.Y.S.2d 165, 399 N.E.2d 1185 (1979) (recognizing privilege for fair and true account of congressional committee's report). The press's "record privilege" is analogous to the privilege members of Congress enjoy by virtue of the Speech and Debate clause.

If this Court were to affirm a broad scope for the privilege protecting members of Congress, the analogous privilege for the press to report and comment on those remarks would be strengthened. Conversely, the risk to the press in reporting and commenting on statements made by members of Congress would be reduced.[5] This petition, therefore, presents this Court with an opportunity to affirm and protect the flow of information to the public through the press, both directly and indirectly. Directly, recognition of a privilege would encourage members of Congress to speak openly to the press. Indirectly, a privilege for members of Congress would

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[5] If the Court recognizes a privilege for Congress, a member would enjoy a privilege for his speech and would bear no risk of liability for his words. In states that do not yet recognize this privilege, the press, on the other hand, would not be protected by even a qualified privilege to republish those words. This would lead to the illogical result that in a defamation suit against both the legislator and the republisher, the press alone would bear exposure to liability.

strengthen the qualified privilege of the press to make fair and accurate reports of statements made by those members within the scope of their official duties.

CONCLUSION

For these reasons, amici urge this Court to grant Representative Sundquist's petition for *certiorari* and reverse the decision of the Court of Appeals that refused to recognize a privilege for statements made by members of Congress in the course of their official duties but outside the floor of Congress. Members of Congress should be free to speak openly on issues of public concern at any time and in any place.

Respectfully submitted this 24th day of May, 1988.

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